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Law . Tax

# Energy Disputes





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CMS Cameron McKenna has ‘a breadth of expertise’ on hand that can cover any legal issue that may present itself.

*Legal 500 2010, Tier 1, Projects,  
Energy & Natural Resources*



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# Energy Disputes

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## An international practice

**Your World First** is our Energy Disputes Team's commitment to you.

At CMS, we strive to spend more time looking outward at your world than inward at ours. As a leading and trusted adviser to the energy sector, we aim to give you an advantage today by anticipating your challenges of tomorrow.

Our dedicated Energy Disputes Team understands the particular commercial, technical and regulatory environment of the industry in which you work. We are focused on resolving disputes arising in the energy sector, giving us a uniquely enhanced knowledge of your world and an unrivalled experience of resolving the kinds of disputes that arise in the commercial context of the oil, gas and power industries.

We pride ourselves on our technical legal expertise and on being a pragmatic advisor seeking to deliver quality representation and advice focused on getting you real business results, not just giving opinions.

**Your World First** is a global vision with deep local roots. As a law firm with the second largest global footprint of any international law firm, and over 3,000 lawyers and tax professionals, including over 580 disputes lawyers worldwide, we are consistently ranked in the Global Arbitration Review 'GAR30' of the world's busiest international arbitration practices. Our market leading Energy Disputes Team advises clients in the UK and across the globe from South America to the Far East.

Our ability to focus on **Your World First** is recognised in legal directories such as Chambers Global which has described us as *'the best firm in the energy sector'* and Legal 500: *'CMS is, according to one client, 'the best oil and gas practice in the UK.'*

So whether you foresee a problem arising and would like some guidance on the best course to steer, or whether you face litigation, international arbitration or other forms of dispute resolution, whether in Africa, Europe, Russia, the Middle East, Latin America or Asia, you are in safe hands with us.



CMS is endorsed by the market as a 'team on top of its game' that delivers an excellent service' and 'very commercial, snappy, smart advice'. It is lauded for in-depth knowledge of the energy industry, boasting expertise across the full range of concerns spanning oil and gas, power and disputes. Clients rave about the team's international capabilities...

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# Joint Operating Disputes

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Disputes between parties to joint operating agreements and bidding agreements can present unique challenges as they exist within the framework of on-going commercial relationships, and against the backdrop of the relevant licence (underlying grant or interest). It is therefore important to instruct dispute resolution specialists that are familiar with the wider regulatory, commercial and legal contexts of oil and gas upstream activities, including experience with the relevant OGUK and AIPN model form agreements.

## Hot topics

- A lower oil and gas price environment and particularly in the UKCS a profusion of medium to small participants has resulted in unpaid cash-calls.
- Financial pressure resulting in disputes concerning work programmes and budgets, AFEs, cost overruns and operator duties.

## Recent highlights include:

- Acting for an international exploration and production company in two separate multi-party disputes with its JOA partners concerning unpaid cash-calls under an operating agreement modelled on the AIPN model form relating to assets in Africa (LCIA Arbitration).
- Acting for a FTSE100 oil company in a dispute concerning a forfeiture notice in respect of an unpaid cash-call under a JOA modelled on the OGUK model form (England, High Court).
- Acting for an independent oil company concerning an unpaid cash-call and allegations of wilful misconduct under a JOA modelled on the OGUK model form (England, High Court).
- Acting for an independent international oil and gas company concerning its participating interest under a bidding agreement and JOA modelled on the AIPN model form relating to assets in Iraq (ICC Arbitration).
- Advising an international exploration and production company, as operator, in disputes with its JV partner arising out of JOA, PSC and farm-out agreements concerning offshore licences in East Africa.
- Acting for an offshore exploration company in relation to disputes under a JOA following the drilling of a dry exploratory well (England, High Court).



## Case Study

CMS represented an operator resisting injunctive relief sought from the English High Court concerning the issuing of a Default Notice under a UKCS JOA modelled on the OGUK model form agreement.

Issues that arose included the validity of the cash-call being made, the enforceability of forfeiture provisions and the extent to which a side agreement required a company in the group of the operator to extend an existing loan to the defaulting party to subsidise the additional expenditure. The dispute was a 'bet the company' dispute for the defaulting party.

Against the context of the terms of the JOA and various loan agreements, the CMS Energy Disputes Team prepared the responsive documents to the injunctive relief application – whilst working alongside CMS' energy restructuring specialists to restructure the terms of the financial arrangements to resolve the impasse between the parties.

The parties were then able to successfully restructure their contractual arrangements prior to the need for Court intervention.



What makes them different is their absolute understanding of the industry.

*Chambers Global*

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# Concession Disputes

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## Licences, Production Sharing Contracts (PSCs), Concessions and Technical Service Contracts (TSCs)

Disputes relating to licences, concessions, PSCs and TSCs create specific challenges. Usually involving the host state or national oil company, it is important for lawyers to understand the variances between the differing legal structures of the relevant grant/interest (e.g. PSC, TSC, etc.), as well as the strategic implications of entering into a formal dispute process with the host state or national oil company.

Investments in the energy sector are often high-value, high-risk transactions in politically and economically volatile markets. Protecting and preserving these interests is the highest priority for many of our exploration and production clients.

In parallel with disagreements concerning grants, there may also be issues concerning local oil and gas law, local investment law or international treaty obligations.

### Hot topics

- The lower oil price environment is resulting in disagreements concerning the completion of minimum work commitment obligations, both between the joint venture partners and with host states.
- Government pressure to re-negotiate terms or aggressive interpretation of agreements by state parties so as to make up lost revenue through falls in the oil price.

### Recent highlights include:

- Acting for an international investor in an arbitration for approximately US\$100 million relating to the purported determination and frustration of beneficial interests in PSCs in Iraq (LCIA Arbitration).
- Acting for an international oil company in relation to a dispute with an Asian sub-continent government under a Bilateral Investment Treaty and PSC (ICSID Arbitration).
- Advising an international oil company in various disputes with a national oil company concerning cost recovery under a TSC.

- Advising an international oil company in relation to a potential dispute with a national oil company and a host state concerning taxation and the cost recovery provisions in a PSC.
- Acting for and advising an independent oil company on a potential Energy Charter Treaty claim in relation to a participating interest concerning a permit in the Mediterranean Sea (Local Courts).
- Acting for an international oil company in relation to claims totalling approximately US\$120 million arising from the negotiation of PSCs in Turkmenistan and associated banking issues (English and Scottish Courts).



### Case Study

CMS acted for a major oil and gas company in a complex and high value dispute concerning a North African PSC. Our involvement included the initial merits review, ad-hoc and institutional conciliations and through to French language ICC arbitral proceedings with a Geneva seat. With the seat being in Geneva and the proceedings in French, our CMS team included lawyers in London, Geneva and North Africa, demonstrating our cross jurisdictional capabilities for these types of disputes.



This tremendously strong and dedicated energy team's commitment to the sector is paying dividends, as peers comment on the 'remarkably high quality' of the group's work...

*Client feedback*



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‘The legal acumen and responsiveness are top notch’ at CMS Cameron McKenna LLP, whose arbitration team has become ‘a real force’ and is highly recommended for energy and financial services disputes.

*Chambers and Partners*



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# Transportation and Processing Disputes

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The maturity of the UKCS and other hydrocarbon basins is now resulting in an increase of transportation and processing disputes concerning the shift to cost-sharing, third party access terms and decommissioning – raising contractual, competition and regulatory issues.

These disputes can define the value of a company or the underlying asset in dispute, with an adverse decision resulting in huge value transfers to competitors or premature cessation of activities.

The CMS Energy Disputes Team is regularly engaged on significant disputes concerning transportation and processing infrastructure, both internationally and on the UKCS. Our experience includes issues under the English Energy Act, competition law and ICOP, as well as significant disputes involving sale, transportation and processing agreements in numerous jurisdictions.

## Hot topics

- The sharing of infrastructure costs for processing and transportation, including the shift to (and calculation of) cost sharing.
- The potential 'domino effect' of higher transportation/processing costs resulting in premature decommissioning of assets.

## Recent highlights include:

- Acting for an international oil company in a multi-party arbitration relating to the operation of quality bank calculations in an oil transportation agreement, and the impact of a previous award on 12 parties to the dispute (UNCITRAL Rules, Stockholm seat, administered by the PCA).
- Advising an international oil company in relation to a dispute concerning send-or-pay and condition precedents in a North Sea transportation, processing and operating services agreement.
- Advising an international oil company on a dispute concerning the calculation of transportation costs after a shift from tariff to cost-sharing and the impact of various events, including force majeure and maintenance on this calculation.
- Advising an international oil company on an expert determination concerning indemnity provisions under a tie-in agreement.



## Case Study

CMS acted for a wholly-owned subsidiary of an international oil company in a significant English High Court dispute with another subsidiary of an energy company. The dispute concerned the interpretation and purported termination of transportation and processing services agreements. It was a 'bet the field' dispute for our client.

Our client applied for an interim injunction to ensure that services continued pending resolution of the dispute (which the counterparty conceded shortly before the hearing), and made claims on behalf of our client for both wrongful breach of contract and anti-competitive behaviour.

Through pressure of litigation, we were able to secure a favourable settlement of the dispute for our client shortly before trial. The parties now enjoy an on-going commercial relationship with services continuing.



CMS get the bigger picture and work within it. I like their commercial approach.

*Client, major oil and gas company*



The best oil and gas practice in the UK.

*UK Legal 500*



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# Natural Gas and LNG Price Reviews, Oil Sales & Market Abuse

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Amid the liberalisation of gas markets and increasing liquidity in the various types of trading hubs, the prevalence in Europe of long-term gas sales and purchase agreements and the price reviews that accompany them has diminished.

Yet for legacy contracts, projects requiring substantial infrastructure expenditure and in some regions of the world, long-term gas contracts remain necessary – as do price formulae and price reviews. For parties to these agreements, price review negotiations are a critical aspect of their business model.

The CMS Energy Disputes Team has significant experience in gas price arbitrations and associated competition law or market abuse issues having acted and advised in a large number of gas pricing arbitrations across the globe. We are experienced at working with clients to seek a structured compromise solution. Where this is not possible, we have the experience and fire power to pursue any dispute through to a final arbitral award.

gas sales agreement for delivery in a continental European country with the price benchmarked against import prices of another country.

- Advising an international oil company on two substantial gas price reviews relating to pricing of natural gas in India.
- Advising a national oil company in a dispute valued at approximately US\$16 billion relating to the pricing of oil pursuant to a twenty-year sale and purchase agreement.
- Acting for a gas storage provider in an arbitration in Albania (LMAA Arbitration).
- Advising an international oil company in a dispute valued at approximately US\$16 billion relating to the pricing of oil pursuant to a twenty-year sale and purchase agreement with a Chinese state-owned oil and gas company.

For more information, please ask for our separate price review brochure, '**Price Reviews: Results through Experience**'.

## Hot topics

- On-going dislocation between short term trading price and pricing under long-term gas sales and LNG agreements.
- Associated competition law issues, concerning the legality of take-or-pay oil linked contracts in the European market.
- Risks concerning market manipulation, abuse of dominant position and insider information in trading at European hubs (particularly in view of the REMIT regulation).

## Recent highlights include:

- Acting for a European gas purchaser in a price review arbitration valued at approximately US\$4.5 billion relating to LNG sales from Africa (UNCITRAL Arbitration).
- Acting for a European gas purchaser in a price review arbitration with a value in dispute exceeding US\$3 billion (UNCITRAL Arbitration).
- Acting for a seller in a multi-billion Euro ad-hoc arbitration relating to the pricing of a long-term pipeline



## Case Study

In a recent price review negotiation, our client was provided with a price review notice and presentation by the opposing party that set out the basis for the proposed change to the price formula. We worked with the client's team of experts and established that the opposing party was relying on flawed data, out of line with the market-segmentation and inconsistent with the legal requirements of the price review provision.

We summarised the flaws and provided effective arguments that could be used in negotiations. These were used by the client to achieve a positive global settlement of several price review disputes.



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# Energy-related Engineering, Procurement & Construction Disputes

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In the energy industry, the delivery of a key element of a project on time can be critical to an entire project's financial success. Small delays can lead to important milestones being missed and result in significant delays. In addition, the realignment of hydrocarbon prices has placed EPC contracts under greater cost scrutiny from operators and their joint venture partners.

EPC contracts and related agreements in the energy industry are legally and technically complex and require in-depth understanding to address the issues and risks arising in such contracts.

The CMS Energy Disputes Team has broad-based experience in EPC disputes on the UKCS and internationally. Our experience means that we are able to mobilise an expert team on your disputes, providing on-going advice during the project management phase to mitigate risks, as well as acting as counsel in significant disputes.

## Hot topics

- Downward cost pressure in a depressed oil price environment.
- Shortage of heavy lifting vessels, resulting in project programme risks.

## Recent highlights include:

- Acting for an international oil company in a dispute valued at US\$450 million with its contractor over the construction of initial production facilities in Iraq (LCIA Arbitration).
- Acting for a major oil & gas services company in proceedings relating to claims and counterclaims arising from a contract to design, fabricate and construct process packages for installation onto a gas recovery module (England, High Court).
- Advising an international oil company on claims/counterclaims of approximately US\$100 million arising from a construction contract relating to a gas recovery module (ICC Arbitration).
- Advising an international drilling company in relation to claims of approximately US\$10 million arising out of drilling operations in Iran.
- Representing a contractor in proceedings relating to claims and counterclaims in excess of US\$20 million arising from an EPC contract for the fabrication and construction of the topsides of an FPSO (England, High Court and Court of Appeal).
- Advising a Danish engineering company on a dispute involving claims in excess of US\$20 million relating to the construction of a cement facility in Nigeria.



## Case Study

We recently acted in a complex and multi-faceted arbitration for an oil major relating to the re-development of an oilfield in the Middle East. The claim was brought by our client's EPC Contractor during an on-going project, and concerned dozens of variations valued in the hundreds of million dollars. Our client was the operator/lead contractor.

We assisted our client both in defending the claims during the arbitration, as well as with the management of the project on a day-to-day basis. This included liaising with and managing the expectations of our client's JV partners (who had their own interests), as well as the National Oil Company and Government.



CMS is a solid, top-quality firm that delivers what we ask for when we need it.

*Chambers UK*

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# M&A and Warranty Claims & Disputes

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The pressure on hydrocarbon prices has had a direct impact on mergers, acquisitions and asset purchases. Deals that have not reached completion may stall, or not reach completion at all. Deals that have reached completion may result in post-completion disputes, including claims for breaches of warranties and representations and disputes concerning performance valuations and/or earn-out valuations.

The CMS Energy Disputes Team specialises in energy related cross-border M&A disputes, and has represented clients in litigation, arbitration and expert determination. We work closely with our corporate teams to achieve the best possible outcomes for our clients, ideally avoiding litigation and/or arbitration where possible.

## Hot topics

- Failure to complete transactions for various reasons, but largely arising from a shift in hydrocarbon prices.
- Disputes concerning representations and warranties, so as to claw-back value from asset pricing that now seems 'out of market'.

## Recent highlights include:

- Acting for an independent oil company in a High Court action in relation to the unwinding of an M&A transaction concerning assets in Africa where post-completion conditions were not satisfied (England, High Court).
- Acting for an independent oil and gas exploration company in a dispute arising out of an SPA relating to a number of licences in North Africa (England, High Court).
- Acting for an international oil company in a 'bet-the-field' dispute relating to forfeiture of an asset on the Irish continental shelf for failure to complete works within a specified period under the farm-in agreement (England, High Court).
- Acting for an independent oil company concerning its farm-in obligations relating to a Block off-shore West Africa.



## Case Study

We recently acted for a client in multi-million pound English High Court proceedings concerning representations and warranties made under a sale and purchase agreement relating to assets in North Africa. The claim concerned whether there had been a significant non-disclosure during the negotiation of the sale and purchase agreement, reducing the value of the asset.

The dispute included issues under the local law of the country in which the assets were held, which CMS was able to navigate using its experience in the region. We were also able to use our experience and local knowledge to lead negotiations with the other side, which resulted in a successful settlement for the client without the need for a full trial on the issues.



Strong industry knowledge and business acumen.

*UK Legal 500*

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# FPSO and Rig Disputes

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FPSO and rig contracts can give rise to a variety of disputes concerning construction, breakdown, remuneration, performance, termination and spread-costs. The CMS Energy Disputes Team has significant experience across the full range of such disputes, including advising on the termination of a number of FPSO contracts concerning operations in Brazil, the categorisation of costs for the purposes of remuneration, liquidated damages for delay and disruption, project cost overruns, equipment/engineering accidents and failures, payment during periods of breakdown and set-off of spread-costs during periods of non-performance.

Our significant experience in this area means that we understand the commercial drivers of differing arrangements and are able to assist clients in a multitude of difficult and time-pressured scenarios.

## Hot topics

- 'Out of market' rig rates for long-term arrangements in a lower demand environment.
- Realignment of work programmes meaning that there is insufficient work to be carried out for charters in excess of a few months.
- The 'set-off' of 'spread-costs' by operators against contractors for periods of non-performance.

## Recent highlights include:

- Advising a Brazilian oil services company in relation to a dispute concerning the termination of three long-term FPSOs and one platform charter, with a total value of over US\$1.5 billion.
- Advising a Brazilian oil services company in relation to a dispute concerning payments under a contract for the engineering, procurement and construction of an FPSO.
- Advising an international oil company concerning a dispute relating to the payment of the repair rate during periods of breakdown and the set-off of cross-claims for spread costs.
- Advising an FPSO owner concerning disputes over whether specified expenditures were cost-reimbursable under the charter.
- Advising an international oil company in relation to a dispute concerning liquidated damages and delayed delivery of two well head platforms.



## Case Study

CMS was instructed by a leading international oil & gas drilling services company in a dispute concerning one of its flagship oil rigs.

The company that had hired the client's oil rig to drill offshore a Middle Eastern country had stopped paying for it. Underlying this decision was a dispute as to the performance levels of the oil rig, including safety issues following a fatal helicopter crash. The day rate due to be paid to our client over the life of the three year contract was significant. Many expensive crew were on board, with nothing left to do. Further, the oil rig was still located in the hiring company's producing oil field – causing potential liability issues if it was found to be off-contract.

A rapid decision had to be taken as to whether to accept the termination of the contract or not. As with any 'repudiation' situation, great care is required as the decision to accept repudiation or affirm the contract is binding and irrevocable. After travelling to the rig and interviewing relevant witnesses, the CMS team quickly formed a view on the merits of the claim. We then commenced arbitration proceedings on behalf of our client at the London Court of International Arbitration seeking \$100 million in damages for wrongful breach of contract. The case later settled on very good terms.



CMS' excellent practice consistently exceeds expectations.

*UK Legal 500*



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# Environment Disputes

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Drilling and extracting oil or gas in onshore and offshore environments and the transportation, refining or processing and storage of hydrocarbons, is a complex and hazardous process. Even with the implementation of the highest risk management measures, accidents can happen. These may result in financial loss, clean-up costs, ecological damage and, of course, major damage to reputation.

The CMS Energy Disputes Team, which incorporates a dedicated team of environment and health and safety lawyers, has decades of experience in assisting clients with such issues, whether relating to class actions, remediation actions, prosecutions or other administrative law consequences. In terms of non-contentious work, we advise on all aspects of environment due diligence, transactional allocation of risk, environmental impact assessments in oil, gas and power projects, environment permit compliance and environment management systems.

- Advising on soil and groundwater clean-up of hydrocarbon contamination.
- Advising a multi-national beverages manufacturer in relation to kerosene contamination of its groundwater abstraction by a nearby oil storage facility.
- Advising on numerous prosecutions and other enforcement responses relating to alleged permitting breaches, including air emissions and appropriate emissions abatement.
- Regularly advising on and conducting administrative law actions in relation to permitting, including appeals in respect of permit variations or refusals.
- Advising an international power company, the Atomic Weapons Establishment and others in England in relation to protestor actions of various sorts, including protestor occupation of, and attempted forced entry into, facilities.

## Hot topics

- Managing the financial impact of an environmental incident (including against the backdrop of Macondo).
- Fines for environment related criminal offences are significantly increasing in many parts of the world.
- The potential for class actions generated by law firms actively seeking clients worldwide with a view to placing pressure on energy companies to make significant financial settlements.

## Recent highlights include:

- Advising an international oil company concerning its licence obligations and liability for a leaking well on the UKCS following a blow-out during exploration activities.
- Advising on numerous water pollution incidents arising from oil tankers and related infrastructure.
- Advising on neighbourhood disputes arising from migration of contamination from retail petrol stations.

## Case Study – Criminal

We recently successfully defended a client in a prosecution in England before a jury in relation to the most significant inland waters pollution incident in approximately 20 years. Allegedly our client discharged trade effluent containing cyanide from its permitted facility into a sewer. The discharge was said to have then knocked out a sewage treatment works downstream and flowed into a major river causing a significant public health issue and a very large fish kill. Our client was charged with the water pollution incident and several counts of allegedly breaching the permit for its facility.

We vigorously defended our client (including in important satellite permitting proceedings of an administrative law nature) to trial and this resulted in the prosecution collapsing before 'half time' (i.e. before the prosecution had finished its case and before we had to begin the defence case).

## Case Study – Civil

We recently acted for the subsidiary of an international oil company defending class action proceedings in the English High Court brought by a large group of claimants in Africa. The claimants alleged that our client was responsible for a significant oil spill and were seeking substantial damages in relation to loss of livelihood and earnings.

Our client challenged the jurisdiction of the English court to hear the claim. This included formally applying to the High Court to refuse jurisdiction. The application required extensive evidence on issues of the legal position in the relevant African country. It also required an explanation of the relevant law on jurisdiction.

This strategy led to the claimants discontinuing their claim in England in full, meaning that the issues could be addressed in a more suitable forum closer to where the allegations arose.



One of the best firms in the market for environment work.

*UK Legal 500*



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# Disputes that contain Finance or Insolvency issues

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As a result of unpredictable macroeconomic shifts in hydrocarbon prices and other project variables, the creditworthiness of contractual counterparties in the oil and gas industry has been the subject of considerable scrutiny and disputes arising from liquidity difficulties have proliferated since 2014. It is important to understand that the existence of such circumstances can have a radical impact on the legal position of the parties as well as on the appropriate strategies to pursue.

In coordination with the CMS Restructuring Team, the CMS Energy Disputes Team has recently been advising clients on disputes or potential disputes in the energy sector that have taken place against the backdrop of financial difficulties, administration and/or insolvency in multiple jurisdictions.

## Hot topics

- Unpaid cash-calls under JOAs arising from the insolvency of a participant and related forfeiture issues.
- The ownership of assets and/or entitlement to production in the event of counterparty insolvency.
- Depressed hydrocarbon prices which lead to the acceleration of decommissioning security arrangements resulting in disputes concerning such arrangements and potential insolvency of participants.

## Recent highlights include:

- Acting for a FTSE-listed oil company in a 'bet the field' vs 'bet the company' dispute concerning unpaid cash-calls and alleged associated funding arrangements relating to a development on the UKCS (England, High Court).
- Advising and acting for a Brazilian oil services company in relation to the termination of three long-term FPSOs and one well-head platform charter upon the insolvency of the oil company chartering the FPSOs and platform, with a total value of over US\$1.5 billion.
- Acting for an independent oil company in a dispute concerning unwinding the sale of a company with assets in Africa against the backdrop of the potential insolvency of one of the parties (England, High Court).
- Advising and acting for an independent oil company in financial restructuring concerning unpaid cash-calls under a JOA and associated issues concerning the forfeiture of hydrocarbons during a short period of default.
- Acting for an international drilling contractor in an arbitration in relation to taxation issues in Angola (LCIA Arbitration).

## Case Study

CMS acted for an oil company, as seller, that had recently loaded a cargo of refined oil FOB, title transferring at the flange of the vessel, with payment due in five days, when the counterparty declared insolvency two days after loading. Unfortunately, our client did not have a letter of credit in place. As a result, it was in the position of an unsecured creditor for the cargo – which would likely have a value of a few cents in the dollar through the insolvency process. To make the matter more complex, the vessel had sailed to the territorial waters of the insolvent company that was outside the jurisdiction of the European Union insolvency regime.

We acted speedily to establish the current location of the cargo and the existence of onward sale arrangements. Being in possession of the bill of lading, we negotiated with the relevant insolvency practitioners and onward purchasers on behalf of our client to receive direct payment for the cargo. As a result, our client received 98% of what it was due with minimal legal costs.

The outcome was achieved through CMS' extensive experience in dealing with insolvency issues in the energy sector, which means that we understand that it is essential to take different approaches where insolvency issues are concerned.



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# Power Disputes

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## Generation, transmission, distribution, sale (including renewables obligations) and regulation

The CMS Energy Disputes Team has significant experience in dealing with disputes arising in the United Kingdom and global power sector. Ranked as a Tier 1 adviser for Power in Legal 500, CMS is a leader in the field of power disputes. According to Legal 500 CMS' *'excellent practice consistently exceeds expectations'* and it *'gets to the heart of a dispute without taking unnecessarily bullish positions'*.

The CMS Energy Disputes Team also routinely advises energy companies domestically and globally on regulatory issues, including regulatory frameworks in the power sector, electricity generation, transmission and distribution. We also act for clients in disputes concerning renewable energy, clean-tech and on climate change issues.

### Hot topics

- Disruption to projects and contracts caused by changes to the regulatory regime, such as radical changes in feed-in tariff.
- Increasing regulatory oversight of sales at consumer and wholesale level, along with associated risks of prosecution for mis-selling or under competition law.

### Recent highlights include:

- Acting for a system operator in an arbitration concerning the change of law provisions in a power purchase agreement and the associated impact on pricing.
- Advising a Brazilian power producer in relation to a potential dispute concerning the construction of multiple coal-fired power plants in Brazil, along with Italian and Portuguese law parent company guarantees and bank guarantees.
- Advising an independent investor in relation to the legality of the UK Government's early review of Feed-in Tariffs for large scale solar photovoltaic projects.
- Advising multiple energy companies on disputes concerning the impact of the abolition of Levy Exemption Certificates and the impact on power purchase agreements and supply agreements.
- Acting for a major utility in an expert determination and the purported exhaustion of a gas reservoir.
- Acting for a major utility in relation to allegations of mis-selling and breaches of the Standard Licence Conditions.
- Acting for a JV Utility in relation to its application for an investment contract under FIDeR and providing advice in relation to a potential judicial review.
- Acting for a major utility in relation to issues arising under the CERT and ECO regulations.

### Case Study

CMS were instructed by one of the 'Big 6' in relation to an investigation commenced by Ofgem into purported breaches of the Standard Conditions of the Electricity and Gas Supply Licences. Similar investigations had been commenced by Ofgem against other suppliers. The allegations related to how our client had undertaken marketing and telesales activities including how it had estimated levels of consumption in situations where a customer was unable to provide details of its actual consumption and how this information was then used in comparing charges between suppliers.

We worked closely with our client in gathering and analysing information relating to the way in which sales and telemarketing had been undertaken. This information was then reviewed independently by an industry expert who provided an expert opinion on the methodology that had been used. This allowed our client to assess its position more fully whilst it engaged in dialogue with Ofgem. As a result, a resolution of the issues under investigation was achieved together with a conclusion to the investigation.



This is by far the best firm in the energy sector. It combines strength in regulatory and projects work, which makes it the leading player.

*Chambers & Partners Global*

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# International Law and Investment Treaty Arbitration

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Investments in the energy sector are often high-value, high-risk transactions in politically and economically volatile markets. As a consequence, risks such as expropriation, unfair or discriminatory treatment, lack of protection and security and changes to the regulatory landscape contrary to prior assurances are inherent in any major international investment decision.

States typically engage with foreign investors in three roles: (1) as owner of the natural resources within its internationally recognised borders; (2) as regulator of economic activity, including foreign direct investment; and (3) as contracting party, mostly through delegated authority on the part of state-owned entities, (e.g. via a PSC (oil and gas) or an agreement for a Feed-in Tariff (power)).

Alongside any protection created by their project contract, investors experiencing difficulties in a host country may be afforded protection under an international investment treaty, whether bilateral (BITs) or multilateral (MITs), such as the Energy Charter Treaty. In the absence of a direct contractual relationship with or guarantee from the host state, an investment treaty might offer the only form of potential redress.

The CMS Energy Disputes Team has a proven track-record in advising and representing clients in international investment treaty arbitrations, and has experience of dealing with states in all three roles described above.

## Hot topics

- Instability caused by the fall in oil prices and the global economic recession resulting in host states seeking to realign risks and rewards.
- International boundary issues (e.g. hydrocarbon resources straddling international boundaries, drilling in contested waters or pipelines crossing international borders).
- Human rights obligations affecting international energy companies and other business enterprises in the emerging and developed markets.

## Recent highlights include:

- Acting for a major oil company in an international investment arbitration against Ukraine over the illegal takeover of an oil refinery.
- Advising the Romanian State in a US\$147 million investment treaty arbitration that involved multiple privatisation, post-privatisation, taxation, criminal procedure and capital repatriation matters.
- Acting for an international oil company in relation to a dispute with an Asian sub-continent government under a Bilateral Investment Treaty and PSC.
- Advising an oil major in relation to implications of drilling in disputed territorial waters between Russia and Ukraine.
- Advising an independent oil company on a potential Energy Charter Treaty claim in relation to a permit in the Mediterranean Sea.
- Representing the Government of Poland in an arbitration brought by a Canadian investor arising from a dispute over certain revoked mining licenses (UNCITRAL Arbitration).

## Case Study

CMS recently represented an international oil company in a parallel investment treaty and production sharing contract claim concerning expropriation of interests in the Far East. CMS' client had received notice of termination of its PSC and a demand to pay penalty sums relating to allegedly incomplete minimum work obligations. CMS worked with the client to establish cases under the PSC and the relevant investment treaty, which included issues of force majeure, full protection and security, expropriation, and fair and equitable treatment. The dispute was settled on commercially advantageous terms for CMS' client and the relationship with the relevant State was preserved.

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# Our Capabilities

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Our commitment to **Your World First** means that we understand the ‘bigger picture’ when disputes arise. The CMS Energy Disputes Team, and CMS, has long-standing, market leading experience and technical expertise in all of the forms of dispute resolution used in the energy sector. As pragmatic advisors, we will seek to help you avoid disputes wherever possible. We can help you put an overall strategy in place at an early stage, and provide you with an objective view of your position and your options that takes account of your commercial drivers and your appetite for risk. Where avoidance of a formal dispute process is not desirable or possible, our focus is on achieving quality results by setting high standards in all forms of dispute resolution.

Our world vision means that the CMS Energy Disputes Team’s experience covers all forms of dispute resolution used in global energy disputes, including **international arbitration** (both commercial and investor-state), **litigation** (either of the underlying dispute or in support of arbitral proceedings), **expert determination**, **adjudication** and **mediation**.

With the second largest global footprint of any law firm, deep local roots, and over 580 disputes lawyers worldwide, we can respond quickly to highly technical and high value disputes wherever they arise.

## International Arbitration

Consistently ranked in the Global Arbitration Review ‘GAR30’ of the world’s busiest international arbitration practices, our CMS team advises clients in international arbitration across the globe. The CMS Energy Disputes Team has a significant track record in international arbitration, whatever the law applicable to the dispute, the language of the arbitration, the seat of the hearing or the arbitration rules under which the dispute is to be resolved.

Lawyers from the CMS Energy Disputes Team act as counsel in both commercial and investor-state disputes. We are accustomed to dealing with the various arbitral bodies and rules, and their differing procedures, including the LCIA, ICC, UNCITRAL, ICSID, AAA-ICDR, SCC and many others. Over the last 5 years, our caseload for energy disputes alone has had a value in dispute of over US\$20 billion.

## Commercial Litigation

The CMS Energy Disputes Team frequently acts in proceedings in the English Courts, including at appellate level. We routinely deal with applications for urgent interlocutory relief and anti-suit injunctions, as well as substantive hearings on the merits of a dispute.

## Expert Determination

Many agreements used throughout the energy industry contain reference to resolving disputes through expert determination. Such procedures require flexibility and an ability to mobilise resources quickly. The CMS Energy Disputes Team has significant experience in dealing with expert determinations, from the engagement of an expert and drafting the terms of reference, assisting with submissions and the presentation of technical arguments, through to enforcing the expert determinations.

## Mediation

The CMS Energy Disputes Team has a breadth of mediation experience, including an accredited mediator amongst its partners and is skilled at guiding clients successfully through the mediation process, from selection of an appropriate mediator to full support throughout the mediation day.



International  
Arbitration

Commercial  
Litigation

Our  
capabilities

Expert  
Determination

Mediation



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# Our Experience

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## Oil, Gas and LNG

- Representing a major European gas purchaser in a price review arbitration with a value in dispute in excess of US\$800 million (UNCITRAL Arbitration).
- Representing an investment company in four arbitrations in relation to some of the first oil concessions in post-war Iraq valued in excess of US\$140 million (LCIA Arbitration).
- Advising a Nigerian investment company in an arbitration against a West African Government in relation to oil and gas exploration rights valued in excess of US\$3 billion (ICC Arbitration).
- Advising an international oil company in relation to a potential dispute with a national oil company and a host state concerning taxation and the cost recovery provisions in a production sharing contract (ICSID Arbitration).
- Representing a major European gas purchaser in a price review arbitration with a value in excess of US\$1.5 billion (UNCITRAL Arbitration).
- Advising a major international operator of mobile oil and gas production units in relation to a dispute concerning the operation and maintenance of a Floating Production Storage and Offloading facility in use offshore Brazil.
- Advising on the early termination of a high performance new build drill ship for inadequate commissioning works.
- Advising an international oil company on a price review with an African energy company under a long-term gas sales agreement governed by English law.
- Representing an international offshore oil services company in an arbitration concerning an alleged breach of a 'teaming' agreement to bid for the laying of a subsea oil pipeline to an offshore floating oil platform (LCIA Arbitration).
- Representing a Norwegian charter company in an arbitration concerning an alleged breach of the charterparty for a drillship offshore Trinidad (LCIA Arbitration).
- Advising a pipelay contractor in an arbitration valued at around US\$5 million arising out of delay to a pipelaying project in the Black Sea, offshore Bulgaria, caused by poor weather conditions.
- Representing an oil services company in an ICC arbitration relating to defective parts used in the manufacture of 57 safety valves that were supplied to customers for use in oil and gas wells (ICC Arbitration).
- Acting in an arbitration against a provider of engineering and construction services in respect of alleged breaches of an EPC contract for the delivery of a fixed offshore oil platform.
- Advising a Greek gas company on take-or-pay issues under a long-term gas sales agreement.
- Advising an offshore contractor in relation to claims in excess of US\$100 million arising out of the construction of subsea infrastructure in the Mediterranean.
- Advising a Dutch registered gas pipeline owner in respect of disputes arising under an EPC turnkey contract for the delivery of two sub-sea gas pipelines between Russia and Turkey, and a pipeline inspection services contract involving English and German inspection services companies.
- Representing an oil exploration company in relation to the revocation of a concession agreement for a major oil field in Ukraine following government intervention.
- Advising a major oil and gas company in relation to a dispute with the government of Syria relating to governmental consents for the building of gas production and transmission facilities.
- Advising an LNG terminal owner in relation to force majeure due to start-up difficulties at the liquification plant, leading to shortfalls under related long-term LNG supply agreements.
- Representing a UK oil and gas company in court proceedings relating to the performance of a North Sea CRINE/LOGIC contract, the condition of the mobile drilling rig and whether claimed damages relating to spread costs could properly be set-off from invoices (England, Commercial Court).
- Advising a major oil company on the significant litigation risks involved in the proposed acquisition of a multibillion dollar interest in an oilfield in an emerging market.

- Representing Northern Ireland Electricity (NIE) in a dispute relating to the proper construction of the charging provisions in a long-term gas supply agreement for the supply of gas to Northern Ireland leading to the judgment of the Court of Appeal in *Centrica Plc & Anor v Premier Power Ltd* [2007] EWCA Civ 1225.
- Representing Baker Hughes in the successful defence of an application (and subsequent appeal) to stay proceedings pursuant to section 9 of the Arbitration Act 1996 (England, High Court) (*Baker Hughes Limited v Steadfast Engineering Company Limited* [2009] EW HC 3123 (QB)).
- Representing an international LNG company in resisting the enforcement of a Texas Court judgment in England.
- Advising an oil services company on a potential claim in relation to a contract for the disposal of drilling waste, valued at approximately £1.2 million (England, Technology and Construction Court).
- Advising an oil and gas production and development company in relation to a dispute valued at over £10.4 million in relation to the hire of an FPSO vessel (England, Commercial Court).
- Representing an independent oil company with group assets in Congo in relation to resisting a Third Party Debt Order arising out of the enforcement of an arbitral award in excess of £100 million (plus interest).
- Representing the owner and operator of a rig in relation to sums claimed by a management agent for alleged 'retrospective' taxation, fines and penalties for the importation of a rig and support vessel into Angolan territorial waters.
- Advising a drilling company in relation to claims of around US\$10 million in relation to drilling services provided in Iran.
- Representing an oilfield services company in relation to claims arising from catastrophic undersea failures of specialist pile-joining equipment in the Gulf of Mexico.
- Advising a drilling contractor in relation to a dayrates claim of approximately CAN\$40 million in relation to the hire of a drilling rig offshore North America.
- Representing an independent oil company to enforce a Swedish arbitration award in the UK against an oil company for debts owed under a contract for oil exploration services.
- Advising an oil and gas exploration and production company in relation to a dispute concerning the recovery of outstanding earn-in costs following the completion of a North Sea farm-in agreement and the subsequent negotiation of long-term financing arrangements.
- Advising an investor group concerning a variety of investment treaty and commercial arbitration claims concerning the loss of oil exploration rights.
- Advising a major oil company on Ukrainian law issues in relation to an investment arbitration against Ukraine under the Russia-Ukraine Bilateral Investment Treaty (UNCITRAL Arbitration).
- Advising an investor group in relation to a multi-billion dollar investment arbitration claim against the Ukrainian Government arising out of a gas product sharing agreement. Potential treaty claims available to investors included those under the Energy Charter Treaty and several bilateral investment treaties.
- Acting for an oil company in relation to a dispute with a contractor concerning trenching works for the development of gas fields in the Dutch North Sea (*Canyon Offshore Limited -v- GDF SUEZ E&P Nederland B.V.* [2014] EWHC (Comm) 604).
- Advising an international oil company in relation to the sums due at termination of a North Sea gas supply agreement concerning the construction and interpretation of termination and take-or-pay provisions.
- Advising an international oil company on the termination of a gas storage project due to the non-satisfaction of a condition precedent to a development stage of the project.
- Advising a seller in relation to the construction and interpretation of a legacy North Sea gas supply agreement concerning the pricing of additional natural gas taken by the buyer in excess of the annual contract quantity (England, High Court).
- Advising a Japanese energy company in relation to potential disputes arising out of a condensate recycling joint venture project in Australia.
- Advising an independent gas company in relation to a dispute with another participant concerning multiple onshore petroleum exploration and development licences and joint operating agreements for the exploration and production of conventional and unconventional gas in England and Wales.
- Advising a gas transportation company in relation to defending a claim for disconnection, arising from a decision to disconnect the gas connection and supply due to the existence of an illegal meter bypass.
- Advising a gas transportation company in defending a claim for compensation under section 33AA of the Gas Act 1986 and the Gas (Standards of Performance) Regulations 2005.
- Advising a company owning a regasification facility in the United Kingdom in relation to various disputes with shippers.
- Advising an oil company, as buyer, in a price review valued at approximately US\$3 billion relating to LNG sales from Nigerian LNG delivered into Spain, seat London.
- Advising an oil company in relation to a price review under a legacy North Sea GSA governed by Swiss law, seat Geneva.

- Acting for an international company in a multi-billion Euro ad-hoc arbitration relating to the pricing of a long-term pipeline gas sales agreement.
- Advising a national gas company in relation to the renegotiation of a long-term LNG sale and purchase agreement for deliveries into an Eastern European country.
- Advising an Indian oil company on two price reviews under long-term gas sales agreements for gas deliveries in India.
- Advising an international oil company in relation to proceedings commenced against it in the Iraqi Courts by a contractor claiming unpaid sums.
- Advising an international oil company in relation to a claim for unpaid sums allegedly owing to a contractor for works in Iraq, including issues of forum for dispute resolution.
- Advising an independent oil company in relation to potential disputes concerning a joint venture agreement and production sharing contract in Iraq.
- Advising an independent oil company in relation to a potential dispute concerning a parent company guarantee relating to underlying performance obligations of a subsidiary operating in Iraq.
- Advising an independent oil company in relation to the settlement of liabilities upon termination of upstream participating interests in Iraq.
- Advising an independent oil company in relation to potential apportionment of liabilities arising out of a production sharing contract and joint venture agreement pending a sub-division of the underlying contract area and an amendment to the joint venture agreement in Iraq.
- Advising an independent oil company in a joint venture dispute concerning unpaid cash-calls and security relating to assets in Madagascar.
- Advising an international oil company on a dispute relating to the mobilisation of a drilling unit for works offshore Tanzania.
- Advising an independent oil company in relation to a dispute concerning its obligations to drill a well under a farm-in arrangement relating to a block offshore Equatorial Guinea.
- Advising a contractor in relation to a joint venture dispute concerning the design and construction of a slurry pipeline in Morocco.
- Advising an independent oil company in relation to alleged breach of letter of intent to farm-in to an asset in Sub-Saharan Africa.
- Advising an independent oil company in relation to an alleged sum due for services under a consultancy agreement concerning an asset in Ghana.
- Advising an oil company in relation to unpaid cash-calls under the North Sea JOA and the forfeiture of hydrocarbons on a permanent basis after the non-payment of cash-calls.

- Advising an international oil company in a dispute with a contractor concerning the construction of three platforms and a compression module for the field on the UKCS.

## Electricity and Power

- Representing a power company in an Electricity Arbitration Association arbitration arising out of contractual change in law provisions due to the EU emissions trading scheme.
- Advising a Malaysian company in relation to the structured renegotiation of long-term power purchasing agreements.
- Advising an energy trading company in relation to trading in Holland and related guarantees.
- Advising a Polish power company on the recovery of damages (including business interruption losses exceeding €10 million) following turbine damage during maintenance.
- Advising a waste to energy provider in relation to a dispute concerning high voltage and low voltage energy spikes following an Ofgem investigation.
- Advising a power company in relation to an expert determination concerning amendments to be made to power supply agreements to reflect changes brought about by the EU emissions trading scheme.
- Advising a regulated power company in relation to a regulatory dispute concerning the proper application of a connection charging regime.
- Advising a waste to energy provider in relation to a dispute arising out of an electricity export contract.
- Advising the seller of a company offering metering services in relation to a potential warranty claim under a sale and purchase agreement.

## Environment and Decommissioning

- Advising a major energy company on enforcing an arbitral award in the UAE regarding potential decommissioning liabilities of its interest in a North Sea gas field.
- Representing a major waste management group in relation to environment permitting disputes, prosecutions, enforcement actions and civil disputes arising from their energy from waste activities.
- Representing Northern Ireland Electricity in relation to a contractual dispute concerning emissions abatement equipment.
- Representing a manufacturer in relation to hydrocarbon contamination of its groundwater abstraction from a neighbouring oil storage depot.
- Representing a major energy company in relation to a breach of warranty claim over environmental improvements to a German refinery.



- Representing a number of energy, other utility and manufacturing companies relating to contentious civil and regulatory waste management issues and water pollution incidents.
- Advising on M&A warranty disputes relating to detection and clean up of contamination and nuisances from retail petrol stations.
- Advising a waste to energy provider in relation to a dispute concerning obligations to take or re-route waste used as fuel in a green energy power plant.
- Representing the Atomic Weapons Establishment in the Blue Circle test case, being a leading case on the migration of radioactive contamination from a nuclear installation.
- Representing Equitas in relation to reinsurance issues arising out of the Exxon Valdez grounding and oil spill and the subsequent settlement of US\$780 million under the primary policy.
- Advising a mining company in relation to a dispute concerning the supply of roof support equipment.
- Advising a major mining company on a dispute concerning the price formula for domestic coal under a long-term exclusive supply agreement.
- Advising the Ministry of Finance of the Czech Republic in proceedings before European Commission regarding alleged provision of illegal state aid during the privatisation and sale of the State's stake in OKD, the largest coal mining company in the Czech Republic.
- Representing a Greek industrial conglomerate in an investment treaty arbitration (UNCITRAL Arbitration).
- Advising the Ministry of Finance of the Czech Republic in major arbitration relating to 44,000 apartments in the North East of the Czech Republic owned by the leading mining company. The value of the arbitration was approximately €65 million.

## Mining

- Advising a Swiss mining company in relation to three potential arbitrations concerning two sale and purchase agreements and one guarantee, governing gold mining interests in the Russian Federation (LCIA Arbitration, seat London).
- Advising a Swedish mining company in relation to the operation of an English law option and shareholders agreement, governing gold mining interests in the Russian Federation.
- Advising a co-venturer in a zinc mine over breaches of a shareholder's agreement, leading to a call-in under the financing documents.

## Renewables

- Advising a national transmission operator in the preparation of an Energy Charter Treaty claim against the Government of Spain grounded on the reduction of Feed-in Tariff for photovoltaic installations.
- Advising private investors in the Czech Republic in respect of new rules for photovoltaic energy plants, including drafting a constitutional complaint and administrative action.

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# Geographical Spread of Expertise

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CMS Energy Disputes: ‘matters relating to oil and gas investments in every continent except Antarctica’.

*Global Arbitration Review*



...Clients rave about the team’s international capabilities...

*Chambers and Partners (UK)*



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